

***In re* Lenora J. Pernell**

Docket No. 00-12

Date of Decision: July 30, 2001

Cite as: *In re* Pernell (7/30/01)

Before: Michael Wolf, Chair, for the Board

Stay

Permanent stay

Standard of review

ORDER

On May 21, 2001, the Administrative Judge issued an order denying Petitioner's request for a permanent stay. The Order has been appealed pursuant to 4 C.F.R. §28.133(f). We are remanding this issue back to the Administrative Judge for a clarification of his decision.

At page 7 of his Order, the Administrative Judge states that he is required to assess "whether the Petitioner would likely prevail after an evidentiary hearing. . . ." The Administrative Judge suggests that this Board should apply the same standard used by the federal courts when deciding motions for stays and injunctions. Applying this standard, he concludes that "Petitioner would [not] likely prevail at a hearing on the merits. . . ." *Id.* at 9. However, the Administrative Judge also suggests that the failure to satisfy this standard does not automatically preclude granting a permanent stay, since he then proceeds to consider the comparative harms that would arguably be suffered by each party during the pendency of the litigation. We are therefore unclear as to whether the Administrative Judge has utilized the federal preliminary injunction standard as the baseline for deciding whether a Petitioner has satisfied the requirements of Section 28.133(e)(1).

It is our view that Section 28.133(e)(1) does not incorporate the standards that the federal courts apply when deciding preliminary injunctions. See, e.g., *Amazon.com v. BarnesandNoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (movant must prove "a reasonable likelihood of success on the merits"). In 1989, a proposal was made to rewrite this regulation using language very similar to the federal standard; this Board rejected that proposal. The language actually adopted in 1993, when the regulation was finally amended, does not replicate either the federal preliminary injunction standard or the MSPB standard for deciding requests for a stay of administrative action. To say that a case "involves" a prohibited personnel practice, as the regulation states in (e)(1), is not the same

as saying that Petitioner must prove at a preliminary stage of the case that she is likely to ultimately prevail on the merits. We take from this regulatory history a decision by the Board to craft an independent methodology for deciding these kinds of motions.

It appears to us that the Administrative Judge may have referred to the federal injunction standard for purposes of responding to the General Counsel's arguments, without actually concluding that this standard provides a mandatory minimum level of proof under Section 28.133(e)(1). As indicated above, we do not believe that Section 28.133(e)(1) requires a Petitioner to satisfy the federal standard as a pre-condition for obtaining a permanent stay. We are remanding so that the Administrative Judge can clarify his position on this issue.

SO ORDERED.